



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 22, 2004

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2004-10811

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 215390.

The Texas Department of Transportation (the "department") received a request for twelve categories of information pertaining to a certain property and its relationship to a specified department project. You indicate that some of the requested information does not exist.<sup>1</sup> You claim that the remaining requested information is excepted from disclosure pursuant to sections 552.105 and 552.111 of the Government Code and is confidential under rule 192.3 of the Texas Rules of Civil Procedure. We have considered your arguments and have reviewed the submitted representative sample documents.<sup>2</sup>

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<sup>1</sup>It is implicit in several provisions of the Act that it applies only to information already in existence. See Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. See Attorney General Opinion H-90 (1973); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975); *Econ. Opp. Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. — San Antonio 1978, writ dismissed). However, a governmental body must make a good faith effort to relate a request to information that it holds. See Open Records Decision No. 561 at 8 (1990).

<sup>2</sup> We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that the information that you have submitted as Exhibit C is subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Exhibit C constitutes a completed appraisal report made for the department that must be released under section 552.022(a)(1), unless it is expressly confidential under other law. Although you claim that Exhibit C is excepted from disclosure pursuant to sections 552.105 and 552.111 of the Government Code, we note that these sections are discretionary exceptions to disclosure under the Act that do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 663 (1999) (governmental body may waive Gov't Code § 552.111), 564 (1990) (governmental body may waive statutory predecessor to Gov't Code § 552.105). Accordingly, we conclude that the department may not withhold any information contained in Exhibit C under section 552.105 or section 552.111.

You also contend, however, that Exhibit C constitutes a consulting expert report that may be withheld from disclosure under the consulting expert privilege found in rule 192.3(e) of the Texas Rules of Civil Procedure.<sup>3</sup> We note that a party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts. *See* TEX. R. CIV. P. 192.3(e). We further note that a "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." TEX. R. CIV. P. 192.7. You explain that when acquiring land, the department obtains expert advice from licensed appraisers in preparing for possible eminent domain litigation. Further, you state that the department does not anticipate calling these experts as witnesses at this time. Based on your representations and our review of Exhibit C, we agree that this exhibit constitutes the opinions of a consulting expert. Accordingly, we conclude that the department may withhold Exhibit C pursuant to rule 192.3(e) of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001).

You also claim that the remaining submitted information is excepted from disclosure pursuant to section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

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<sup>3</sup>The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001).

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. This section is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information pertaining to such negotiations that is excepted from disclosure under section 552.105 may be withheld from disclosure so long as the transaction relating to the information is not complete. *See* Open Records Decision No. 310 (1982). A governmental body may withhold information pursuant to section 552.105 "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Thus, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* Open Records Decision No. 564 (1990).

In this instance, you state that the department has made a good faith determination that the information that you seek to withhold from the requestor pertains to the appraisal or purchase price of real property that the department intends to purchase. Further, you explain that the release of this information may harm the department's ability to negotiate. Based on your representations and our review of the remaining submitted information, we conclude that the department may withhold the remaining submitted information pursuant to section 552.105 of the Government Code.

In summary, the department may withhold Exhibit C pursuant to rule 192.3 of the Texas Rules of Civil Procedure. The department may withhold the remaining submitted information pursuant to section 552.105 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

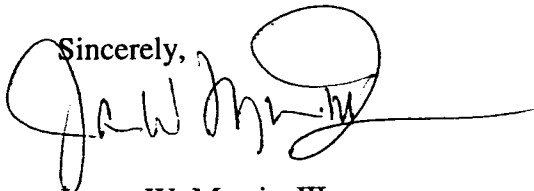
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal flourish extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/RJB/krl

Ref: ID# 215390

Enc. Submitted documents

c: Mr. Phillip L. Chumley  
Attorney at Law  
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(w/o enclosures)